91-1446

Supreme Court, U.S.
FILED
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NO. 91-

In the Supreme Court of the United States

OCTOBER TERM, 1991

THE HONORABLE JACK BROOKS, PETITIONER,

v.

W. DOUGLAS WILLIAMS, ET AL., RESPONDENTS

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT
OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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APRIL 1992

QUESTION PRESENTED

Is the doctrine of absolute official immunity broader than, or is it coextensive with, Speech and Debate Clause immunity against claims of defamation for comments made in a television interview by a member of Congress?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

The Honorable Jack Brooks, Petitioner; and

W. (Weldon) Douglas Williams and Texas Dynamics, Inc., a Texas corporation in which Williams is the only shareholder, Respondents.

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THE HONORABLE JACK BROOKS, PETITIONER,

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W. DOUGLAS WILLIAMS, ET AL., RESPONDENTS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES:

Respondents, W. Douglas Williams and Texas Dynamics, by and through their attorney, respectfully pray that this Honorable Court deny the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this proceeding entered on October 31, 1991.

OPINIONS BELOW

The opinion of the district court was not published, and is attached as Appendix A. The opinion of the Court of Appeals is reported at *Williams v. Brooks,* 945 F.2d 1322 (5th Cir. 1991), and is attached as Appendix B.

JURISDICTION

Respondents adopt Petitioner's statement.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, §1, provides "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article 1, §6, provides "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

Article 1, §8, provides, in part, "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excise, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes;

* * * * *

To make all Laws which shall be necessary and proper

for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The entire text of Article I § 8 is reproduced as Appendix C

STATEMENT OF THE CASE

Although the opinion of the Fifth Circuit fully describes the facts of the case, Respondents believe a partial restatement is necessary where Petitioner has overstated the facts and where Petitioner has presented certain statements as facts which Respondents believe are merely conclusions.

Respondents, W. Douglas Williams and Texas Dynamics, Inc., had a contract with the Battleship Texas Advisory Board to raise money to restore the sixty-year-old Battleship Texas, which is berthed at a state park in Harris County, Texas. App. B, 5a. Williams' compensation was to be ten percent of the funds raised. App. B, 6a.

Williams raised money from private sources and also successfully lobbied for passage of a Congressional appropriation of $5,080,000 for restoration of the ship. The funds were to be distributed as a grant from the U.S. Navy. App. B, 6a.

Before the Navy funds were disbursed, the Board terminated the Williams/Texas Dynamics contract. Williams contended that the contract entitled them a fee of $508,000, ten percent of the grant. App. B, 6a. Respondents disagree with Petitioner's assertions (page 2 of its brief) that Williams sought an "influence" commission.

Congressman Brooks became involved in the dispute. In January of 1987, he wrote Secretary of the Navy, John

F. Lehman saying, "in my opinion, it would certainly be against public policy—and possibly illegal as well—for Federal funds to be diverted to such use" and requested that the Navy not proceed with the distribution of any funds. The grant was withdrawn. App. B, 6a. Brooks' letter to Secretary Lehman is not a part of Williams complaint. App. B, 6-7a.

Soon after the grant was withdrawn, public interest and concern was aroused because it appeared that there would be no money forthcoming to restore the Battleship.

On February 24, 1987, Petitioner, Congressman Jack Brooks, was interviewed in his Washington office by KTRK television (Channel 13) of Houston, Texas. In the interview, Brooks stated that the person concerned (who could only be understood to be Williams) was "an ordinary hustler" and/or "a small-time hustler," that Williams' conduct was "illegal and immoral" and that "five and ten percenters" such as Williams "were put in jail under Eisenhower and that's where they ought to put them." App. B, 6-7a. The statements contained in the televised interview are the only complaint in this suit.

On March 5, 1987, more than a week after this interview with Brooks was broadcast, the House Subcommittee on Defense met to consider the fiscal year 1987 supplemental appropriation. App. B, 7a.

On March 25, 1987, the House Appropriations Committee reported the Supplemental Appropriations Bill for Fiscal 1987 which provided that the Navy funds would be used only for actual restoration of the ship, and not for remuneration of fund raising activities." App. B, 7a.

The Supplemental Appropriations Bill was signed into law on July 11, 1987. The grant funds were finally distributed and restoration of the Battleship is now complete.

Representative Brooks has claimed throughout this litigation that the foregoing sequence of events constitutes pending administrative and legislative action at the time his statement was made to Channel 13. Petitioner's Brief pp. 3, 6, 9-10, App. B, 7a. However, the trial Court specifically found that there was no legislation pending at the time Brooks was interviewed. App. A, 3a.

In addition to overstating the facts of the case, Petitioner's description of the Fifth Circuit opinion is quoted so out of context that it rises to the level of inaccuracy.

Petitioners' brief states on page 7, "The panel even cited and noted the cases which specifically held that congressmen are entitled to official immunity from suits for common law torts. App. B at 18a. However, the panel declined to follow these..." In sharp contrast to Petitioner's optimistic description, the opinion says:

> Congressman Brooks states that the courts of other circuits have routinely applied the doctrine of official immunity to legislators. Nonetheless, only two of the cases cited specifically held that congressmen are entitled to official immunity from suits for common law torts. See *Adams v. American Bar Ass'n*, 400 F.Supp. 219, 226 (E.D.Pa. 1975) (cabinet officers, congressmen, and other federal officials entitled to *Barr* official immunity); *Dunlap v. Wahlstrom*, Civ. Action No. 82-184 (ED.Ky. July 6, 1983) aff'd, 738 F.2d 438 (6th Cir.1984) (unpublished) (congressmen and case-worker entitled to official immunity). The other cited cases involve either local officials, qualified immunity, or Speech or Debate Clause immunity. (Citations in original, footnote omitted.) App. B at 18a.

SUMMARY OF ARGUMENT

If this Court were to decide to review the issue of whether "official" immunity should protect legislators for a broader range of activities than "Speech and Debate immunity" this case is an unsuitable vehicle for such review because this Court would be required to review two bodies of well developed law—its definition of legislative duties and its requirement that the immunized activity be in furtherance of, or arising from the duties of the official.

Congressman Brooks claims he is entitled to the same absolute immunity created by this Court in *Barr v. Matteo* [1] "to shield public officials from undue interference with their duties and from potentially disabling threats of liability" [2]

Neither the Fifth Circuit nor the District Court have disagreed with that concept. These Courts applied long standing judicial definitions of legislative duties and held that "official immunity" has the same scope as "Speech and Debate Clause" immunity.[3]

It is the judicial definition of legislative duties which explains apparently conflicting results in several cases where the Supreme Court granted immunity to an executive branch official for remarks made in a press releases about propriety of the expenditures of federal money,[4] but not to members of Congress for the similar comments.[5]

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[1] *Barr v. Matteo* 360 US 564 (1959

[2] *Harlow v. Fitzgerald* 457 US 800 (1982)

[3] *Williams v. Brooks* Appendix A; Appendix B

[4] *Barr v. Matteo* 360 US 564 (1959); *Bush v. Lucas* 598 F.2d 958 (5th Cir. 1979) aff'd on another issue, 462 US 367 (1983)

[5] *Williams v. Brooks* 945 F.2d, 1322 (5th Cir., 1991); *Chastain v. Sundquist*, 833 F. 2d 1268 (D.C. Cir. 1987) cert. denied 487 U.S. 1240 (1988); *Hutchinson v. Proxmire* 443 U.S. 111 (1979) 7, 13

Granting Brooks immunity under the pretext that he was commenting either on pending litigation or on misuse of federal funds would mean, because of the nature of matters considered by Congress, the ordinary citizen would have no remedy against defamation by a Member of Congress.

THIS CASE WAS DECIDED CORRECTLY UNDER EXISTING LAW AND DOES NOT PRESENT NEW ISSUES REQUIRING REVIEW.

I. ESTABLISHED LAW REQUIRES A DIRECT RELATIONSHIP BETWEEN THE ACTIVITY COMPLAINED OF AND THE DUTIES OF THE OFFICIAL SEEKING IMMUNITY.

The test, "outer perimeter of official's duty" takes meaning and shape only upon review of the factual circumstances of the cases in which immunity is either granted or denied. The discussion of *Barr v. Matteo*, in the introduction of *Butz v. Economou*, 438 U.S. 478 (1978) reiterates how important the scope of Barr's authority and the circumstances of the case were as factors in the decision to grant immunity.

Congressman Brooks' arguments that he is entitled to "official immunity" seems to be predicated on the notion that "official immunity" is a talisman protecting executive or judicial branch officials whenever they make statements to the press. This is not the case. In *Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980) a prosecutor accompanied the police in executing a search warrant. The process was televised. One of the prosecutors said the Marerros had been arrested and that $79,000 worth of jewelry was stolen. The prosecutor was not granted absolute immunity.

Since *Barr v. Matteo* is the originating case, it may be useful to review its facts.

Barr became the acting director of the Office of Rent

Stabilization. He took office at the time the agency's activity of terminating employees, paying them for unused vacation time and then rehiring them, was being denounced on the floor of Congress and in the press. Barr issued a press release in response to press inquiries about the issue. It announced that the two agency employees he deemed responsible for this practice would be suspended and set out Barr's (self-serving) disapproval of the prior actions. Apparently Miss Matteo and her co-plaintiff had prepared a letter purporting to be from Barr which misrepresented his position the issue. *Id* at 565-566.

After a full trial, Barr was found personally liable for defaming Miss Matteo and her co-plaintiff.

The issue that makes *Barr* the originating case for many other decisions to grant immunity was whether allegations of malice destroyed immunity that was available under previous decisions. *Id* at 569. The opinions in *Barr* reveal that the Justices were highly concerned that agency officials would be deterred from speaking on matters of public concern if they had individual liability for their statements and, therefore granted immunity.

In *Lynch v. Johnson*, 420 F.2d 818, (6th Cir. 1970) the court sent a case to trial to determine if the official was acting in an official or unofficial capacity to determine if immunity should be granted.

Another case in which summary judgement was granted on the basis of absolute executive immunity was *Bush v. Lucas*, 598 F.2d 958 (5th Cir. 1979), affirmed on other grounds, 462 U.S. 367 (1983). Bush was an employee of Marshall Space Flight Center who claimed in two television interviews that he had little meaningful work to do. After Bush was interviewed for the second time, Lucas, the Center's director, was holding a press conference for the Center's birthday and was questioned about the statements made by Bush. Lucas replied,

"... such a statement has no basis in fact" and was sued for defamation by Bush.

There are cases raising claims of some type of immunity for all the various individuals performing governmental functions. The variety extends from the President to the dog catcher. The actions complained of range from the trivial to the tragic. Some cases arose in times of conflict and dissent; others reflect now discredited opinions and attitudes; others are timeless.

The following is a quick review of the factual background of several cases in which absolute immunity has been granted.

In *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), former President Nixon was granted absolute immunity against claims that he had participated in a conspiracy regarding the firing of Fitzgerald, an Air Force employee who claimed he was fired because he told Congress about cost overruns. The firing was claimed to be in violation of Fitzgerald's constitutional rights. The broad scope of the President's constitutional and statutory authority was cited as the reason the act fell within the outer perimeter of his duty. [6] However, the Court held that Nixon's co-defendants were entitled to only qualified immunity, because of the nature of their duties. This would seem to indicate that even if the action complained of raises a constitutional issue, the duty of the official is a major factor in whether to grant qualified or absolute immunity. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Dog catchers were granted immunity in *Allred v. Suarczkodf*, 573 F.2d 1146 (10th Cir. 1978), and *Kostivek v. Town of Riverhead*, 570 F. Supp 603 (E.D. N.Y. 1983). In *Allred* the dogcatcher was sued when he arrested a

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[6]The Court had already held that the President had no immunity against criminal prosecution. *U.S. v. Nixon*, 418 U.S. 683 (1974).

woman who refused to sign an agreement to appear in court on the citation for a loose dog. In Kostivek the dog catcher was sued for overnight imprisonment of a collarless dog found running loose.

An Internal Revenue Service employee was held to be immune for claims his demotion of a subordinate caused the demoted employee to commit suicide in *Palermo v. Rorex*, 806 F.2d 1266 (5th Cir.) Cert. denied 484 U.S. 819 (1987).

Gray v Bell, 712 F.2d 490 D.C. (Cir. 1983), was a suit by the former acting director of the F.B.I., L.Patrick Gray, III, against former Attorney General Griffin Bell. Gray was indicted by a federal Grand Jury for authorizing burglaries of homes of friends of suspected members of the Weathermen underground organization. Eventually, the charges were dismissed, but Gray sued Bell for malicious prosecution. The Court granted absolute immunity for all actions taken before the Grand Jury as that was advocatory prosecutorial conduct. However, qualified immunity applies for investigative conduct.

Ex parte Virginia, 100 U.S. 339 (1879) concerned a suit against a county judge who refused to include blacks on his jury lists. The Court refused to grant immunity saying that making the jury list was not a judicial act.

A weatherman was granted immunity in *Spencer v. New Orleans Levee Board*, 737 F.2d 435 (5th Cir. 1984) when he was sued individually for failure to warn of heavy rains.

The link between the action complained of and the duties of a governmental official which is required before official immunity would attach is not present in the case before the Court.

II. SPEECH AND DEBATE CLAUSE IMMUNITY IS BROAD ENOUGH TO PROTECT AREAS OF CONDUCT WHICH REQUIRE IMMUNITY.

Speech and Debate Immunity has been expanded over the centuries to protect many activities which do not come within the literal protection of Article One, Section Six of the United States Constitution.

Doe v. McMillan, 412 U.S. 306 (1973) outlines the evolution of the expansion of protection under the Speech and Debate Clause. Committee meetings come within its scope. State Legislatures come within its scope. Congressional aides come within its scope.

However, just as there is in the jurisprudence of official immunity, there is a boundary to the protection of the Speech and Debate Clause. That boundary is according to *Gravel v. United States*, 408 U.S. 606 (1972) is determined by the relationship of the act to the legislative process:

> That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature...Insofar, as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which members participate in the committee and House proceedings with respect to other matters which the Constitution places within the jurisdiction of either House.

In *United States v. Brewster*, 408 U.S. 501 (1971), the Court is not as restrained.

> It is well known, of course, that members of the Congress engage in many activities other

> than the purely legislative activities protected by the Speech and Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called "news letters" to constituents, news releases and speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause. Careful examination of the decided cases reveals that the Court has regarded the protection as reaching only those things "generally done in a session of the House by one of its members in relation to the business before it,..."

The issue of whether actions are political does not occur when the action is committed by an executive branch employee.

However, the fact that the Court has decided that certain activities are political, not legislative, and therefore, not protected by the Speech and Debate Clause, does not mean that the textual limitations of the Speech and Debate Clause compels such a result. If previous Courts had felt so constrained, only words spoken by members of Congress on the floor of Congress would be protected.

CONCLUSION

The opinion in *Chastain v. Sundquist,* 833 F.2d 311 (D.C. Cir. 1987), is an admirable review of the legal issues and policy considerations involved in immunity issues. Unlike *Chastain v. Sundquist,* the case before us does not involve communication with an official in the Executive Branch.

After the D. C. Circuit declined to grant *en banc* review of its decision in *Chastain v. Sundquist*, the House of Representatives passed a resolution requesting this Honorable Court to review this question, by a vote of 413 to 0.

This is more harmony than members of Congress demonstrate on most issues, and certainly on issues regarding public access to their business. However, in view of Congress' ongoing exclusion of itself from the requirements of the freedom of information act, it appears that its statement of commitment to public access to information about its activities is duplicitous.

The essential concept in all immunity cases is expressed perfectly by *Gray v. Bell*, 712 F.2d 490 (D.C. Cir. 1983).

> absolute immunity is only available if the claim is based on performance of a governmental function so sensitive as to warrant complete freedom from suit. Over the past decade the Court has sought to delimit the doctrine by identifying certain functionally discreet areas of official conduct characterized by their unique importance or constitutional status that deserve absolute immunity from suit for violations of federal law.

The case before us presents no such issues.

APPENDIX A

In the United States District Court for the Southern District of Texas, Houston Division

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CIVIL ACTION NO. H-88-1632

W. DOUGLAS WILLIAMS, INDIVIDUALLY, AND DOING BUSINESS AS TEXAS DYNAMICS, INC., PLAINTIFF,

v.

THE HONORABLE JACK BROOKS, DEFENDANT.

ORDER

Pending before this Court is Defendant Honorable Jack Brooks' ("Brooks") Motion to Dismiss (Document #7).

Having considered said motion, the submissions of the parties, the arguments of counsel in open court on February 13, 1989, and the applicable law, the Court concludes that Defendant Brooks' Motion to Dismiss should be, and hereby is, DENIED.

DISMISSAL

Dismissal is proper only where it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Furthermore, in the context of dismissal based on an invocation of offi-

cial immunity by Defendant Brooks, a determination that Defendant cannot claim absolute immunity is sufficient to deny Defendant's Motion to Dismiss. *See Davis v. Passman*, 544 F.2d 865, 882 (5th Cir. 1977), *rev'd en banc on other grounds*, 571 F.2d 793 (1978), *rev'd*, 442 U.S. 228 (1979). Defendant Brooks has stipulated for purposes of this motion that the facts as pleaded by Plaintiff are true.

OFFICIAL IMMUNITY

The United States Constitution grants absolute immunity to Members of Congress with respect to any speech, debate, vote, report, or action done in session under the Speech or Debate Clause. U.S. Const. art. I, § 6. *See Scheuer v. Rhodes*, 416 U.S. 232, 239 (1974). In addition, there is a judicially created absolute immunity which protects a federal official from claims based upon statements or actions within the "outer perimeter" of his line of duty as a federal official. *Barr v. Mateo*, 360 U.S. 564, 575 (1959) (judicially created official immunity applies to executive officials). As it applies to legislative officials, however, absolute official immunity merely fulfills the mandate of the Speech or Debate Clause. *See Minton v. St. Bernard Parish School Bd.*, 803 F.2d 129, 134-35 (5th Cir. 1986). In practice, the scope of protection of legislative official immunity is equivalent to that of the Speech or Debate Clause. *See Doe v. McMillan*, 412 U.S. 306, 324 (1973) (inquiry into Speech or Debate Clause immunity and legislative official immunity is the same). Thus, the determination that either one is inapplicable means that a legislator's actions or statements are not absolutely immue.

Like the Speech or Debate Clause, absolute immunity extends to legislators only when they are legislating. *Passman*, 544 F.2d at 881. The Speech or Debate Clause does not insulate legislators "who publish and distribute otherwise actionable materials beyond the reasonable requirements of the legislative function." *McMillan*, 412 U.S. at 315-16. Newsletters and press releases are primarily means of informing those outside the legislative forum and are accordingly not entitled to the protection

of legislative immunity. *See Hutchinson v. Proxmire*, 443 U.S. 111, 132-33 (1979) (court is "unable to discern any conscious choice to grant immunity for defamatory statements scattered far and wide by mail, press, and the *electronic media*") (emphasis supplied).

The alleged defamatory statements of Defendant Brooks were made in his government office in Washington and in his capacity as a federal official, but the act of giving an interview to members of the media in his official capacity does not thereby automatically characterize his act as legislative in nature. *See Gravel v. United States*, 408 U.S. 606, 625 (1972) (private publication not essential to deliberations in Congress). For Defendant Brooks' statements to be protected, they must be an "integral part of the deliberative and communicative process, by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Id.* At the time of Congressman Brooks' February 24, 1987, interview, however, there was no legislative action regarding the Battleship Texas pending before the House of Representatives. *See Summary of Facts*, Plaintiff's Supplemental Response to the Defendant's Motion to Dismiss. When acting outside the scope of his legislative duties, a member of Congress is not entitled to absolute immunity from civil liability for defamatory statements. *Chastain v. Sundquist*, 833 F.2d 311, 323 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2914 (1988).

Under the standards articulated by the United States Supreme Court and noted herein, the statements made by Congressman Brooks during his interview with the reporter from KTRK television are not within the legislative sphere protected by absolute immunity. According, there is sufficient cause to deny Defendant Brooks' Motion to Dismiss. *See Passman*, 544 F.2d at 882. It is therefore

ORDERED that Defendant's Motion to Dismiss be hereby DENIED.

SIGNED at Houston, Texas, on this 16 day of March, 1990.

DAVID HITTNER,
United States District Judge.

APPENDIX B

W. DOUGLAS WILLIAMS, PLAINTIFF-APPELLEE,

v.

HONORABLE JACK BROOKS, DEFENDANT-APPELLANT.

No. 90-2406.

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

Oct. 31, 1991.

Appeal from the United States District Court for the Southern District of Texas.

Before REAVLEY, GARWOOD and BARKSDALE, Circuit Judges.

GARWOOD, Circuit Judge:

The sole issue in this interlocutory appeal is whether defendant-appellant The Honorable Jack Brooks (Congressman Brooks), as a Member of Congress, is absolutely immune under the doctrine of official immunity from a claim for defamation brought by a private citizen for comments made in a television interview. We hold that he is not, and we therefore affirm the district court's denial of his claim of official immunity.

FACTS AND PROCEEDINGS BELOW

In 1983, the State of Texas established the Battleship Texas Advisory Board (Board) to promote the restoration of the Battleship Texas. The Board sought private donations to fund the restoration. The plaintiff-appellee, W. Douglas Williams (Williams), works as a fund raiser in political affairs, both individually and through Texas Dynamics, Inc., a corporation of which he is the sole shareholder. Williams contracted with the Board to raise money for the restoration of the battleship.

In addition to the solicitation of private donations, those interested in the restoration effort sought public funds. Their efforts were successful; on October 30, 1986, Congress enacted the Continuing Appropriations for Fiscal Year 1987. In part of this continuing resolution providing for defense appropriations, the law made $5,080,000 available for a grant to the Board. After the appropriations bill was passed, but before funds were disbursed under the grant, the Board terminated Williams' contract. Williams contended that his contract entitled him to compensation equivalent to ten percent of the federal appropriation. A controversy developed over the compensation to be paid by the Board to Williams.

During the course of the controversy, in January 1987, Congressman Brooks wrote a letter to Secretary of the Navy John F. Lehman regarding the federal appropriation. The letter referred to Williams' claim for a share of the federal funds and stated that, in Congressman Brooks' opinion, it would "be against public policy—and possibly illegal as well—for Federal funds to be diverted to such use." Congressman Brooks requested a delay in administrative action before any disbursement of funds. A copy of the letter was sent to Williams, whose counsel sent his own letter in response. Secretary Lehman agreed that the appropriated sums should not be used for fund raising, and the grant was withdrawn until the issue could be resolved.

The allegedly defamatory statements were made by Congressman Brooks in a television interview at his Washington government office. Williams' complaint alleges that:

> "[O]n or about February 14, 1987, the Defendant, Jack Brooks, was interviewed in his Washington office by a representative of KTRK television, also known as channel 13, which is located in Houston, Texas, and said interview related to the controversy which has arisen in connection with the restoration of the Battleship Texas. During said interview, which was videotaped or otherwise recorded by

> agents of KTRK television, the Defendant spoke the following words of and concerning the Plaintiffs which in the context of said interview could only be understood to refer to Plaintiff Williams and his corporation. In this regard, Defendant Brooks stated that Plaintiff Williams was 'an ordinary hustler' and/or 'a small-time hustler.' Defendant Brooks further stated that Plaintiff Williams' conduct was 'illegal and immoral' and that 'five and ten percenters' such as Plaintiff Williams 'were put in jail under Eisenhower and that's where they ought to put them.' "[1]

Congressman Brooks contends that his position on the controversy regarding remuneration for Williams was being enacted into law at the time his statement was made to KTRK. Williams disagrees, and the trial court's order states that there was no legislative action pending at the time Congressman Brooks was interviewed. In any event, on March 5, the week after the KTRK broadcast, the House Subcommittee on Defense, with jurisdiction over the Battleship Texas grant, had a meeting regarding the fiscal year 1987 supplemental appropriations. On March 25, the House Appropriations Committee reported the Supplemental Appropriations Bill for Fiscal 1987 to the House. The bill contained language clarifying that the monies appropriated for the Battleship Texas were to be used only for restoration and not for remuneration of fund-raising activities. The supplemental appropriations bill was signed into law on July 11, 1987, with the added provision that the grant would be made to the Texas Parks and Wildlife Department instead of the Board.

[1] On February 22, 1988, Williams filed suit against Congressman Brooks in state court, alleging defamation based on Congressman Brooks' statements in the televi-

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[1] According to the brief of Congressman Brooks in this Court, he was actually referring to the 1949 War Assets Administration lobbying scandal, during the Truman presidency.

sion interview. The case was removed to federal court pursuant to 28 U.S.C. § 1442(a)(1) and (4).[2] On June 9,

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[2] Williams did not contest the removal below and does not contest it here. Nonetheless, because it is doubtful whether the federal district court would have had jurisdiction of the case had it been filed in that court, it would appear that the question of removal has not been waived by Williams. *See Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 92 S.Ct. 1344, 1346-48, 31 L.Ed.2d 612 (1972); *Lirette v. N.L. Sperry Sun, Inc.*, 820 F.2d 116, 117-18 (5th Cir. 1987) (en banc). 28 U.S.C. § 1442(a) provides in pertinent part:

"A civil action ... commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office. ...

"(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House."

Removal jurisdiction would appear not to lie under section 1442(a)(4), as Congressman Brooks was not acting "under an order of" the House of Representatives. Such removal is proper under section 1442(a)(1), however, as a congressman is an "officer of the United States" within the meaning of that subsection. *Hill Parents Ass'n v. Giaimo*, 287 F.Supp. 98, 99-100 (D.Conn.1968) (Timbers, J.) (Member of Congress; libel); *Preston v. Edmondson*, 263 F.Supp. 370, 372 (N.D.Okla.1967) (same). *See also Richards v. Harper*, 864 F.2d 85, 86 (9th Cir.1988) (Member of Congress is an officer of the United States within section 1442(a)(1)). As *Giaimo* and *Edmonson* reflect, the "color of ... office" requirement has been broadly construed in cases involving a similar context. *See also Lepucki v. Van Wormer*, 765 F.2d 86, 88-89 (7th Cir.), *cert. denied*, 474 U.S. 827, 106 S.Ct. 86, 88 L.Ed.2d 71 (1985) (libel properly removed under section 1442(a)(1)); *Stein-Sapir v. Birdsell*, 673 F.2d 165 (6th Cir.1982) (same; libel and slander); *Poss v. Lieberman*, 299 F.2d 358, 359 (2d Cir.), *cert. denied*, 370 U.S. 944, 82 S.Ct. 1585, 8 L.Ed.2d 810 (1962) (same; libel); *Malone v. Longo*, 463 F.Supp. 139, 141-42 (E.D.N.Y.1979) (same; libel and slander); *Abrams v. Playle*, 414 F.Supp. 634, 636 (D.Guam 1976) (same; slander). While section 1442(a)(1) implicitly contains the related requirement of assertion of a colorable federal defense, *Mesa v. California*, 489 U.S. 121, 109 S.Ct. 959, 966, 103 L.Ed.2d 99 (1989), this is met in the instant case by Congressman Brooks' assertion of immunity. *See, e.g. Poss*, 299 F.2d at 359, and the other libel or slander cases cited above. We further observe that section 1442(a)(1) does not require that the case be one that could have initially been filed in federal court. *See IMFC Professional*

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1988, Congressman Brooks moved to dismiss the suit, claiming that he is entitled to official immunity under federal law. After briefing and oral argument, the district court in March 1990 denied the motion, and Congressman Brooks then perfected this pretrial appeal.

DISCUSSION

[2] Although the denial of a motion to dismiss is not a final judgment appealable under 28 U.S.C. § 1291, the denial of the instant motion, which raises a colorable claim of immunity, is appealable under the collateral order exception to the finality requirement of section 1291. *See Helstoski v. Meanor*, 442 U.S. 500, 99 S.Ct. 2445, 2449, 61 L.Ed.2d 30 (1979) (Speech or Debate Clause immunity); *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 2697, 73 L.Ed.2d 349 (1982) (presidential absolute immunity); *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 2814–15, 86 L.Ed.2d 411 (1985) (qualified immunity); *Williams v. Collins*, 728 F.2d 721, 724–26 (5th Cir. 1984) (absolute immunity under *Barr v. Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959)).

The district court's denial of a motion to dismiss on immunity grounds presents a question of law, reviewable *de novo*. *Walter v. Torres*, 917 F.2d 1379, 1383 (5th Cir. 1990).

The district court held that official immunity for federal legislators is coextensive with their protection under the Speech or Debate Clause. Congressman Brooks argues that congressmen are entitled to official immunity from suits for common law torts even when immunity would not be available under the Speech or Debate Clause.[3]

Services of Florida, Inc. v. Latin American Home Health, Inc., 676 F.2d 152, 156 (5th Cir.1982). *See also Christensen v. Ward*, 916 F.2d 1462, 1483 (10th Cir. 1990); *State of Florida v. Cohen*, 887 F.2d 1451, 1454 (11th Cir.1989); *Greenspun v. Schlindwein*, 574 F.Supp. 1038, 1041 (E.D.Pa.1983).

[3] Congressman Brooks' motion to dismiss was based solely on official immunity under federal law. However, on February 14, 1989, he filed a "Supplemental Brief With Respect to Recent Statutory Enactment,"

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calling attention to the Federal Employees Liability Reform and Tort Compensation Act of 1988 (FELRA), Public Law 100–694, which was signed into law November 18, 1988. This supplemental brief pointed out that FELRA amended the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2401(b), 2671–80, and (1) extended FTCA coverage to the judicial and legislative branches, 28 U.S.C. § 2671; (2) provided that the FTCA would be the exclusive remedy for personal injury (and other) claims arising from the negligent or wrongful act or omission of a governmental employee acting within the scope of his office or employment (except for constitutional and certain statutory claims), 28 U.S.C. § 2679(b); (3) provided that upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time, the suit would be deemed one against the United States and it would be substituted as the party defendant, 28 U.S.C. § 2679(d); and (4) was applicable to cases pending as of the date of its enactment. Public Law 100–694 § 8(b) (set out as note under 28 U.S.C. § 2679).

The supplemental brief further noted that "discussions" had been initiated with the Department of Justice "with respect to the appropriate certification process to be followed in instances in which, like here, the federal official or employee is not part of the Executive Branch," and suggested that it would be appropriate to postpone oral argument on the motion to dismiss, which was then set for February 27, 1989, "[i]n order to permit such discussions to proceed." Alternatively, it was suggested that the court might want to hear argument on the immunity issue "and, if the case is not dismissed at that point, to set a schedule for briefing and decision of the statutory issue." In a February 23, 1989 response to this supplemental brief, Williams asked for additional time to brief the FELRA-FTCA issue. The district court then reset oral argument on the motion to dismiss for July 10, 1989.

At the July 10, 1989 hearing, Congressman Brooks' counsel informed the court that "[t]here has not been progress" in working out the certification matter with the Department of Justice, "so we have not been in the position to move to dismiss under the Federal Tort Claims Act and we are not raising that as a ground of dismissal." The district court's opinion denying the motion to dismiss did not advert to the FTCA or FELRA, and neither of the parties has adverted to it in the present appeal. Consequently, we express no opinion regarding it.

The record contains no indication that the Attorney General has made the scope of office or employment certification provided for in section 2679(d). Under section 2679(d)(3), if the Attorney General refuses to make such certification "the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment" and if the court

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Speech or Debate Clause Immunity

The Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1, provides that, "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." The clause has been interpreted to protect only "purely legislative activities." *United States v. Brewster*, 408 U.S. 501, 92 S.Ct. 2531, 2537, 33 L.Ed.2d 507 (1972) ("'news letters' to constituents, news releases, and speeches delivered outside the Congress . . . are political in nature rather than legislative"). In *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979), the plaintiff sued a member of Congress for making allegedly defamatory statements in a widely distributed press release. The Supreme Court held that the Speech or Debate Clause did not protect the issuance of the press release because "the transmittal of . . . information by individual Members in order to inform the public . . . is not a part of the legislative function or the deliberations that make up the legislative process." 99 S.Ct. at 2687. Congressman Brooks concedes that controlling Supreme Court precedent precludes a defense of Speech or Debate Clause immunity to this lawsuit.

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so certifies the action shall then become one against the United States and it shall be substituted as the party defendant (no such petition or certification is reflected in the record here). Upon substitution of the United States, the suit proceeds as other suits under the FTCA "subject to the limitations and exceptions applicable to those actions," section 2679(d)(4), and, among other things, "the United States shall be entitled to assert any defense based upon judicial or legislative immunity which would otherwise have been available to the employee . . . as well as any other defenses to which the United States is entitled." 28 U.S.C. § 2674. Under 28 U.S.C. § 2680(h) the provisions of the FTCA "shall not apply to— . . . (h) Any claim arising out of . . . libel, slander. . . ." However, in *United States v. Smith*, —— U.S. ——, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991), a suit against a governmental employee for course of employment negligence where the injury arose in a foreign country and was hence exempted from the FTCA by section 2680(k), the Court held that the FELRA nevertheless authorized substitution of the United States as the sole defendant, and subsequent dismissal of the suit on the basis of section 2680(k).

Official Immunity

[3] The judicially-created doctrine of official immunity protects federal officials from civil suits arising out of actions taken in the performance of their official duties and responsibilities. In *Barr v. Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959), the Supreme Court held that the acting director of the Office of Rent Stabilization was immune from a defamation action because his press statements were "within the outer perimeter of [his] line of duty." 79 S.Ct. at 1341. The Court reasoned that

> "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of th[eir] duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." *Id.* at 1339.

[4] Although the doctrine of official immunity provides only a qualified immunity where constitutional torts are alleged, *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 2732, 73 L.Ed.2d 396 (1982), it provides "absolute immunity from suits [for torts] at common law." *Id.* 102 S.Ct. at 2732-33; *Claus v. Gyorkey*, 674 F.2d 427, 431 (5th Cir. 1982) ("Absent an allegation of a tort of constitutional magnitude, federal officials are entitled to absolute immunity for ordinary torts committed within the scope of their jobs").

[5, 6] A variety of federal and local officials are protected by the doctrine of official immunity.[4] Relying primari-

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[4] *E.g., Harlow*, 102 S.Ct. at 2732 (senior Presidential advisors); *United States v. Burzynski Cancer Research Institute*, 819 F.2d 1301 (5th Cir.1987), *cert. denied sub nom. Wolin v. United States*, 484 U.S. 1065, 108 S.Ct. 1026, 98 L.Ed.2d 990 (1988) (Food & Drug Administration employee); *Williamson v. United States Dep't of Agriculture*, 815 F.2d 368 (5th Cir.1987) (Farmers Home Administration officials); *Palermo v. Rorex*, 806 F.2d 1266 (5th Cir.), *cert. denied*, 484 U.S. 819, 108

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ly upon *Doe v. McMillan*, 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912 (1973), and *Minton v. St. Bernard Parish School Bd.*, 803 F.2d 129, 134-135 (5th Cir.1986), the district court held that in the case of legislative officials, "absolute official immunity merely fulfills the mandate of the Speech or Debate Clause," and, "[i]n practice, the scope of protection of legislative official immunity is equivalent to that of the Speech or Debate Clause." We agree with the district court's reading of these precedents.

In *McMillan*, the parents of District of Columbia school children sought damages and declaratory and injunctive relief for invasion of privacy that they claimed resulted from public dissemination of a congressional committee report assessing the state of the District of Columbia school system. The report included copies of failing test papers, lists of absences, and documents relating to disciplinary problems, in each instance identifying the students involved by name. The defendants included the members of the committee, the committee staff, the Superintendent of Documents, and the Public Printer. The district court dismissed the action against the individual defendants on the ground that the conduct complained of was absolutely privileged. A divided panel of the District of Columbia Circuit affirmed, concluding that these defendants were immune from the liability asserted against them because of the Speech or Debate Clause and the doctrine of official immunity as recognized in *Barr v. Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959).

S.Ct. 77, 98 L.Ed.2d 40 (1987) (IRS agent); *Minton v. St. Bernard Parish School Bd.*, 803 F.2d 129, 135 (5th Cir.1986) (school board members; "[w]hen an official possessing legislative responsibilities engages in official activities," he has the *qualified* immunity "grounded in good faith that is bestowed upon other government officials"); *Williams v. Collins*, 728 F.2d 721 (5th Cir.1984) (Army Corps of Engineers investigators); *Allred v. Svarczkopf*, 573 F.2d 1146 (10th Cir.1978) (dog catcher); *Jones v. Diamond*, 519 F.2d 1090, 1100-01 (5th Cir. 1975) (county board members).

The Supreme Court agreed that the claims against the congressmen and the committee staff were barred under the Speech or Debate Clause. Introducing material at committee hearings, referring the report to the Speaker of the House, and voting for publication of the report were "legislative acts," and, as such, were immune from suit. The Court explained that "a public report may, without losing Speech or Debate Clause protection, be distributed to and used for legislative purposes by Members of Congress, congressional committees, and institutional or individual legislative functionaries." 93 S.Ct. at 2024. The Court declined to examine the appropriateness or usefulness of the information that was published.

The Supreme Court went on to note, however, that "everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause." 93 S.Ct. at 2025. As the Court explained:

> " '[T]he Clause has not been extended beyond the legislative sphere,' and '[l]egislative acts are not all-encompassing.' *Gravel v. United States* [408 U.S. 606] 92 S.Ct. 2614, 2627 [33 L.Ed.2d 583] (1972). Members of Congress may frequently be in touch with and seek to influence the Executive Branch of Government, but this conduct 'though generally done, is not protected legislative activity.' *Id; United States v. Johnson* [383 U.S. 169] 86 S.Ct. 749 [15 L.Ed.2d 681] (1966). Nor does the Speech or Debate Clause protect a private republication of documents introduced and made public at a committee hearing, although the hearing was unquestionably part of the legislative process. *Gravel v. United States, supra.*" 93 S.Ct. at 2025 (citation form modified).

With respect to the claims of the Public Printer and the Superintendent of Documents for immunity under the Speech or Debate Clause, the Supreme Court framed the question as follows: "[W]hether the Speech or Debate Clause affords absolute immunity from private suit to persons who, with authorization from Congress, distribute materials which allegedly infringe upon the rights of in-

dividuals." 93 S.Ct. at 2025. The Court answered the question in the negative:

> "A Member of Congress may not with impunity publish a libel from the speaker's stand in his home district, and clearly the Speech or Debate Clause would not protect such an act even though the libel was read from an official committee report. The reason is that republishing a libel under such circumstances is not an essential part of the legislative process and is not part of that deliberative process 'by which members participate in committee and House proceedings.' By the same token, others, such as the Superintendent of Documents or the Public Printer or legislative personnel, who participate in distribution of actionable material beyond the reasonable bounds of the legislative task, enjoy no Speech or Debate Clause immunity." *Id.* at 2025–26 (citation and footnote omitted).

The Court continued: "Thus, we cannot accept the proposition that in order to perform its legislative function Congress not only must at times consider and use actionable material but also must be free to disseminate it to the public at large, no matter how injurious to private reputation that material might be." *Id.* at 2026.

The Supreme Court reached precisely the same conclusion with respect to the official immunity doctrine. The Court explained its resolution as follows:

> "We conclude that, for the purposes of the judicially fashioned doctrine of immunity, the Public Printer and the Superintendent of Documents are no more free from suit in the case before us than would be a legislative aide who made copies of the materials at issue and distributed them to the public at the direction of his superiors. *The scope of the inquiry becomes equivalent to the inquiry in the context of the Speech or Debate Clause, and the answer is the same.* The business of Congress is to legislate; Congressmen and aides are absolutely immune when they are legislating. But when they act outside the 'sphere of legitimate legislative activity,' they enjoy no special immunity *from local*

> *laws* protecting the good name or the reputation of the ordinary citizen." *Id.* at 2030 (emphasis added and citations omitted).

Although the Court's opinion in *McMillan* appears to us to foreclose Congressman Brooks' official immunity argument, we will proceed to discuss some of the other arguments and authorities raised by the parties.[5]

Congressman Brooks points out that on remand in *McMillan*, the D.C. Circuit held that the Public Printer and the Superintendent of Documents were entitled to "a qualified immunity for their official acts, even though they may exceed the protection of the absolute Speech or Debate Clause immunity." *Doe v. McMillan*, 566 F.2d 713, 719 (D.C.Cir.1977), *cert. denied*, 435 U.S. 969, 98 S.Ct. 1607, 56 L.Ed.2d 59 (1978). The D.C. Circuit allowed qualified immunity because those defendants had acted in good faith and "pursuant to statutory direction or congressional orders that they could have reasonably believed were valid." *Id.* This is not true in the case *sub judice*, and in any event, Congressman Brooks has not sought to invoke qualified immunity, and we have no occasion to, and do not, make any determination as to whether or not it is available.[6]

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[5] We recognize that the concurring opinion of Justice Douglas in *McMillan* appears to afford greater protection to members of the legislative branch under official immunity and the Speech or Debate Clause than does Justice White's opinion for the Court, and that it perhaps arguably reads the Court's opinion differently than we do. Nonetheless, because Justice White's opinion attracted a majority of the Court and Justice Douglas' opinion only three votes, we are bound by the majority opinion notwithstanding the fact that Justice Douglas and the two other justices who joined his opinion also joined the Court's opinion, which otherwise would not have commanded a majority of the Court.

[6] Congressman Brooks also relies on the statement in a footnote in *McMillan* that "[b]oth before and after *Barr*, official immunity has been held applicable to officials of the Legislative Branch." *Id.* 93 S.Ct. at 2028 n. 13. We do not hold that official immunity is not applicable to Congressmen, but we merely hold that the scope of its protection is coextensive with that of the Speech or Debate Clause.

Moreover, the result in *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979), appears inconsistent with finding absolute immunity for Congressman Brooks here. *Proxmire* was a state law defamation suit, and the Supreme Court in substance concluded that federal law did not provide absolute immunity to Senator Proxmire. While the *Proxmire* Court explicitly addressed only the Speech or Debate Clause,[7] and not *Barr v. Matteo* official immunity, it seems most unlikely that it would have reversed the judgments below in favor of Senator Proxmire had official immunity been available. Certainly the facts in *Proxmire* were as favorable to a claim of official immunity as are those here. The failure to discuss that theory in *Proxmire* is likely explainable by the fact that the Court there explicitly held the complained of publications beyond the scope of the protection of the Speech or Debate Clause, and had already held in *McMillan* that in the defamations context official immunity of members of Congress was no broader than that afforded by the Speech or Debate Clause.

Congressman Brooks further contends that this Circuit has recognized that official immunity also covers congressmen. He cites the following language from *Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977), *reh'g en banc granted and opinion vacated*, 553 F.2d 506 (1977) *rev'd on other grounds*, 571 F.2d 793 (1978) (en banc), *rev'd*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), an action against United States Congressman Passman, alleging that he violated the Fifth Amendment by discharging a female staff member because of her sex: "The inapplicability of Speech or Debate protection does not foreclose [a] Representative [ ] from asserting the same qualified immunity available to other government officials." *Id.* at 881 (cita-

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[7] The Court also rejected the claim that the plaintiff was any kind of a public figure, with the result that Senator Proxmire was not entitled to the protection of the "actual malice" rule of *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

tions and footnote omitted). However, the original panel opinion in *Passman* went on to state:

> *"The inapplicability of speech or debate protection does, however, foreclose Representative Passman from asserting an absolute official immunity.* . . . Speech or Debate protection is coextensive with *the need* to afford members of Congress absolute immunity. Absolute immunity extends only to certain key government officials, and then only when they are governing. It extends to prosecutors when they are prosecuting, to judges when they are judging, and to legislators when they are legislating. As indicated, however, legislators are not legislating when they dismiss staff members. For the same reasons that the speech or debate clause does not extend to staff dismissals, Representative Passman cannot invoke absolute immunity." 544 F.2d at 881 (citations omitted) (emphasis added).

In any event, because the panel opinion in *Passman* was vacated on the granting of rehearing en banc and the immunity question was never addressed by the en banc court or by the Supreme Court, it is not binding.

Congressman Brooks states that the courts of other circuits have routinely applied the doctrine of official immunity to legislators. Nonetheless, only two of the cases cited specifically held that congressmen are entitled to official immunity from suits for common law torts. *See Adams v. American Bar Ass'n*, 400 F.Supp. 219, 226 (E.D.Pa. 1975) (cabinet officers, congressmen, and other federal officials entitled to *Barr* official immunity); *Dunlap v. Wahlstrom*, Civ. Action No. 82-184 (E.D.Ky. July 6, 1983) *aff'd*, 738 F.2d 438 (6th Cir.1984) (unpublished) (congressman and caseworker entitled to official immunity). The other cited cases involve either local officials, qualified immunity, or Speech or Debate Clause immunity.[8]

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[8] One of the cases cited by Congressman Brooks indicates that official immunity affords no greater protection to legislators than the Speech or Debate Clause. *Benford v. American Broadcasting Cos., Inc.*,

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A case directly on point and discussed extensively by the parties is *Chastain* v. *Sundquist*. 833 F.2d 311 (D.C.Cir. 1987), *cert. denied*, 487 U.S. 1240, 108 S.Ct. 2914, 101 L.Ed.2d 946 (1988). In that case, the panel majority concluded that "members of Congress . . . cannot claim immunity from defamatory statements unprotected by the Speech or Debate Clause." 833 F.2d at 316. The majority and dissenting opinions in *Sundquist* contain a very thorough discussion of the policy considerations, as well as the law, on this issue.

Congressman Brooks would distinguish *Sundquist* on the ground that it dealt with a legislator who spoke to the press about a dispute between a local legal aid society and a local juvenile court, which was not the subject of federal legislation, in contrast to his statements about Williams' claim for a commission, which pertained to an issue arising from recently enacted appropriations, and about which the House was developing further legislation. Congressman Brooks also contends that *Sundquist* was incorrectly decided because: (1) the panel majority misread the Supreme Court cases, relying on irrelevant Speech or Debate Clause discussions; and (2) *Sundquist* does not explain why the *Barr* rationale—that if officials do not receive official immunity, they would hesitate to give public statements in their official capacities—would be any less true for legislative than for executive officials. Congressman Brooks also points out that, on May 12, 1988, the House of Representatives, by a vote of 413–0, adopted a resolution condemning the *Sundquist* decision "because of its impact on the necessary and proper functioning of the House of Representatives as a coordinate branch of government and as the elected representatives of the American people." H.R.Res. 446, 100th Cong., 2d Sess. Finally, he contends that *Sundquist's* conclusion

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502 F.Supp. 1148, 1158 (D.Md. 1980) ("Absolute official immunity, when applied to the legislative branch, is at most coextensive with the absolute protection afforded by the Speech or Debate Clause").

that congressmen are limited to Speech or Debate immunity under the Constitution

> "produces the self-contradicting result that the officials whom the Constitution most explicitly protects—Members of Congress—receive the least immunity precisely because of that explicit protection, while other Branches—given no textual protection from lawsuit—receive the most immunity."

At least some of these arguments, particularly the latter and that concerning the *Barr* rationale, are not without considerable force. Nonetheless, we ultimately conclude that *Sundquist* properly resolved the immunity question in that case and is not distinguishable from the case before us. To hold that any statements conceivably within the "informing function" of members of Congress are absolutely immune from suit for defamation would almost wholly exempt senators and representatives from state defamation laws, and arguably in that respect expand the Speech or Debate Clause. We are in any event powerless under *McMillan* to expand official absolute immunity as Congressman Brooks requests. We also observe that members of the legislative branch, unlike members of the other coordinate branches of the federal government, have the unique power to pass a law giving themselves immunity from suit. Accordingly, it may be appropriate that any grant to them of more expansive absolute immunity than that already written into the Constitution come about by legislation rather than by judicial decision.[9]

CONCLUSION

For the foregoing reasons, the judgment of the district court is

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[9] The FELRA may be such a statute (see note 3 *supra*). Whether, or in what circumstances, such a grant of immunity could constitutionally override state defamation law is perhaps another question. But if there would be any constitutional problem with such legislation, then we must also assume that judge-made federal law would be subject to essentially the same limitations.

AFFIRMED.

REAVLEY, Circuit Judge, concurring.

I am compelled by the controlling authority to concur in this opinion; but I would hold, if free to do so, that official immunity from common law defamation liability extends to members of Congress when in an official capacity they comment on current legislative issues. *See* Mikva, Circuit Judge, dissenting in *Chastain v. Sundquist*, 833 F.2d 311, 328 (D.C.Cir.1987); *cert. denied*, 487 U.S. 1240, 108 S.Ct. 2914, 101 L.Ed.2d 946 (1988).

APPENDIX C.

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excise shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the Supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than Two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulations of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Mile square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings; - And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.